

# OVERVIEW: JUDICIAL SELECTION

## Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration\*

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### *Introduction*

Affirmative action programs in the public and private sector, that is, positive efforts to recruit members of underrepresented groups in American society to positions long closed to them, have been surrounded by great controversy for more than a decade. Advocates of such programs have asserted that they are ameliorative and benign in nature while opponents label such efforts "reverse discrimination" and ascribe to them a quota mentality which is viewed as objectionable and unconstitutional. The problems raised are clearly most dramatic when affirmative action is taken by the government itself because, from the perspective of the program's advocates, it is in the governmental sector that the consequences of institutionalized discrimination are most graphic. Concurrently, however, the opponents of such programs are bound to perceive governmental involvement as the heart of the constitutional questions that are being raised.

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Most debate over affirmative action programs has been polemical in tone with a dominant focus on the compatibility (or lack thereof) between such programs and concern with "merit" as the basis for individual advancement in American society. For many reasons, the federal judiciary has been an especially prominent subject of the debate. For one, the federal bench has historically been one of the strongest bastions of white male dominance in American society. Indeed, when President Carter took office in 1977 only 22 blacks or Hispanics and 6 women sat among the more than 500 active federal jurists.<sup>1</sup> A second reason for widespread focus on the federal bench was the passage of the Omnibus Judgeship Act of 1978 which created 152 new federal judgeships (117 district and 35 appeals court positions) and alerted many groups and interests to the possibility that these vacancies could be part of an effort to redress past discrimination and move toward a more representative judicial branch. Finally, and perhaps most importantly, the focus on the judiciary corresponded to an announced pursuit of affirmative action by the Carter Administration in the filling of federal judgeships.

The purpose of this article is to examine affirmative action and judicial recruitment during the Carter Administration. What justifications were utilized in the call for affirmative action and what criticisms were levelled against the affirmative action effort? How was affirmative action defined by the Carter Administration and what implications did affirmative action have for nomination outcomes? Did affirmative action "dilute" the quality of the federal bench (as critics of the Carter effort claimed) or, alternatively, did threshold requirements for the appointment of "non-traditional" (that is, non-white or female) judges actually exceed, on some dimensions, the apparent criteria for white male appointees? In order to examine these and other questions, data on all judicial nominees whose names were sent to the Senate Judiciary Committee for a confirmation hearing during the 96th Congress will be analyzed.<sup>2</sup>

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1. Lipshutz & Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483 (1979).

2. The data base for this research consists primarily of the responses to a Senate Judiciary Committee questionnaire administered to all judicial nominees during the 96th Congress. Completion of the questionnaire was required before a nomination hearing would be held on a candidate and, therefore, before any appointment could be finalized on the Senate floor. The detailed questionnaires contain a wealth of comparable data on nominees of a kind previously difficult if not impossible to obtain. Questionnaire responses are likely to result in an unusually valid data source on appointees since they constituted a record, submitted under oath, on which members of the Judiciary Committee, the Senate, the press, other interested parties, and the general public would scrutinize a nominee. Questionnaire data was supplemented by additional variables graciously provided by Professor Sheldon Goldman.

*Justifications for Affirmative Action in Judicial Recruitment*

The primary justification for affirmative action in judicial selection is the need for amelioration of long standing underrepresentation of several elements of American society on the federal bench. As asserted by Goldman, "It does not seem unreasonable to make special efforts to recruit from these groupings of Americans for federal judgeships" as long as race and sex are not utilized in an invidious fashion.<sup>3</sup> In the eyes of the Carter Administration, the reasons which lay behind the contemporary imbalance on the federal bench were irrelevant. Rather, they were simply concerned with the reality of an underrepresentative judicial branch. Thus, according to two Carter advisors, "It accomplishes little to speculate whether these figures reflected a pattern of discrimination in the selection process or general societal factors which had in the past limited the pool of minority and female candidates. Instead, the President . . . simply recognized the existence of a problem which needed to be addressed."<sup>4</sup>

While redress of past and continuing representational wrongs can serve as a primary justification for affirmative action policies, it is important to note that its advocates anticipate that positive benefits will accrue to the American system of justice from increased diversity on the bench. A more pluralistic judiciary, for example, would be "more likely to win the confidence of the diverse groupings in a pluralistic society."<sup>5</sup> In a similar vein the *Washington Post* editorialized, "The strength of the judiciary rests in the way it is perceived by those over whom it sits in judgement. That perception will be infinitely better if the bench is populated with well-qualified men and women of all races . . . than if it is populated only by the 'best' qualified lawyers, particularly if most of them turn out to be white males."<sup>6</sup>

Such justifications for affirmative action rely heavily on the likely impact of a more representative bench on public perceptions and confidence. It is also argued, however, that increased representation of minorities and women would sharpen the judiciary's sensitivity to the complex substantive issues and controversial social issues facing it.<sup>7</sup> Indeed the presence and perspective of non-traditional judges would likely

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3. Goldman, *Should There be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 489 (1979).

4. Lipshutz & Huron, *supra* note 1, at 483.

5. Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978).

6. Wash. Post, Jan. 4, 1979, at A24, col. 1.

7. Thus, according to Goldman, "A judge who is a member of a racial minority or a woman cannot help but bring to the bench a certain sensitivity—indeed, certain qualities of the heart and mind—that may be particularly helpful in dealing with these issues. . . . [T]he presence on the bench in visible numbers of well qualified judges drawn from the mi-

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increase the sensitivities of already seated white male colleagues in ways which could have a considerably greater impact on the judicial process than the direct contribution of the new judges.

Thus, justifications offered for affirmative action in judicial recruitment go well beyond the recognition of past discrimination and a current representational imbalance. Rather, affirmative action efforts are seen as instrumental in assuring a bench which fosters greater public confidence and which is sensitive to the diverse perspectives necessary for a "just" judiciary. Ultimately, advocates of affirmative action would contend that such a policy is not inconsistent with "merit" recruitment but, rather, actually helps to foster a more meritorious bench. From this perspective, perhaps, the debate over affirmative action may be reduced to a debate over the questions of *how* merit is to be defined and *whose* definition of merit is to prevail.

### *Criticisms of Affirmative Action in Judicial Recruitment*

In direct opposition to the advocates' position, critics of affirmative action programs (including those focusing on the implications of such programs in the judicial selection arena) contend that there is a basic and inherent contradiction between affirmative action and appointment of the most qualified individuals.

The precepts of merit selection dictate that only those possessing the most illustrious credentials will be recommended, without regard to political considerations. However, it is claimed, affirmative action is, by its nature, a political goal, and one which directly contravenes the very thrust of merit selection. It submerges quality in order to redress past race and sex discrimination.<sup>8</sup>

Critics of affirmative action ignore the usefulness of outreach efforts and expanded search processes as a means of locating qualified individuals that traditional search procedures miss. They contend that such programs amount to the granting of absolute preference to individual members of underrepresented groups—even when other considerations are *not* in any sense equal. Berkson and Carbon cite instances in the operation of President Carter's U.S. Circuit Judge Nominating Commission where it appears that panel members did bend over backwards to advance the candidacies of individuals they themselves did not feel were sufficiently qualified on the record presented.

Some who seemed to be questionable choices on paper were invited on the

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norities and women cannot help but add a new dimension of justice to our courts. . . ." Goldman, *supra* note 3, at 494.

8. L. BERKSON & S. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES, AND CANDIDATES* 4 (1980).

theory that one's qualifications are not always fully reflected in a written application.

Some women and minorities were interviewed by at least one panel whose members did not believe they were sufficiently qualified to warrant an interview.<sup>9</sup>

Clearly, such an approach did not sit well with some Senators.

We're happy to see affirmative action in the Commission's reaching out to solicit applications and, hopefully, they will turn out to be well qualified. If, however, there is any hint of using balance in an attempt to preserve ratios and dilute the strength of the bench this would be opposed. Outreach is great, but don't put people in spots where they don't belong. This is the standard conservative view on affirmative action.<sup>10</sup>

Sheldon Goldman has catalogued six major objections to affirmative action in federal judicial selection.<sup>11</sup> These objections can be briefly summarized as follows:

1. *The dangers of classifying people*—Inherent dangers exist in the classification of people based upon racial or comparable characteristics. Such classifications run counter to American values and do not allow for the treatment of individuals according to their personal worth.
2. *The threat of reverse discrimination*—When government offers favorable treatment to one group, it is disfavoring another.
3. *The error of focusing on group affiliation*—Affirmative action policies do not focus on individual merit but, rather, offer preference to individuals based on their group affiliation.
4. *The need for governmental neutrality, not favoritism*—Proven constitutional wrongs necessitate the removal of barriers and burdens which led to past discrimination. It is appropriate for government to end discrimination; it is inappropriate to foster favoritism.
5. *The problem of quotas*—Affirmative action leads to quota systems which are inherently at odds with American values and serve to advantage the relatively less deserving.
6. *An inappropriate program for the judiciary*—While affirmative action may be appropriate in other spheres of American life it has no place in the judicial system because of its unique needs and functions.<sup>12</sup>

The central focus for criticism of affirmative action programs has been placed on the "problem of quotas." Clearly, quota mentalities are

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9. *Id.* at 80.

10. Slotnick, *Reforms in Judicial Selection: Will they Affect the Senator's Role?*, 64 JUDICATURE 114, 117 (1980).

11. Goldman, *supra* note 3, at 489-94.

12. Critics might contend that Goldman, as an advocate of affirmative action, levels a strawman argument against it. For formulations by critics of affirmative action see N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975) and B. GROSS, *DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY?* (1978). For other efforts to illuminate the complex issues implicated by the affirmative action debate see B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973) and R. O'NEIL, *DISCRIMINATING AGAINST DISCRIMINATION* (1975).

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inconsistent with the American ethic and the mere suggestion of their usage can serve as a rallying cry for the development of an emotional and active opposition. As Virginia Senator Harry Byrd asserted during a protracted battle over a potential black nominee for the U.S. District Court, "I can't imagine anything worse for the American people than to have a quota system for federal judges."<sup>13</sup> Similar senatorial perspectives on the utilization of quotas emerged in recent research. As one Democratic Senator noted, "It is not our responsibility to guarantee any fixed percentage of different classes of people. You try to get the best qualified people, not some elusive balance." Similarly, an aide to a conservative southern Republican added, "Race or sex has nothing to do with it. Carter has gone too far in trying to impose quotas. The whole approach is off base. . . . We like the principle of merit selection. We applaud that. . . . Yet are they doing that?"<sup>14</sup>

Thus, the tensions between merit and affirmative action are present in the assertions of both supporters and critics of efforts to increase representativeness on the federal bench. At times, however, it appears that the debators cannot even agree on what the nature of the Carter Administration's affirmative action effort was and how that effort should be defined. In part, this may be because of mixed signals from the Administration itself. It is to an attempt to define the Carter Administration's affirmative action policy in judicial recruitment that we now turn.

### *Defining the Carter Affirmative Action Effort*

The basic premises which guided the Carter Administration's activities with regard to increasing the representativeness of the federal bench were rooted in the belief that in a pluralist democracy the diversity among the ruled should be reflected in similar diversity among the rulers. In effect, the Administration's goals were "based on the belief that the governing institutions of a democracy should reflect the spectrum of interests of the governed and that this is done by dispersing the power to govern among representatives of diverse groups. In short, it is assumed that a national judiciary should resemble its national demographic constituency. Therefore, large groups which have been denied extensive representation in government should now be given a greater degree of representation. These values cannot be tested and confirmed or refuted. One can only accept or reject them."<sup>15</sup>

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13. Wash. Post, Apr. 10, 1980, at A1, col. 2.

14. Slotnick, *supra* note 10, at 117.

15. A. NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSION: THEIR MEMBERS, PROCEDURES, AND CANDIDATES 150 (1981).

The official thrust of the President's affirmative action program was revealed in two executive orders; one issued on May 10, 1978 in which the President issued a mandate to his new U.S. Circuit Judge Nominating Commission and the other issued on November 8, 1978 establishing "standards and guidelines" for the appointment of district judges under the Omnibus Judgeship Act. In the initial executive order the President underlined the need for the advisory circuit panels to cast a wide net in seeking candidates and they were encouraged "to make special efforts to . . . identify well qualified women and members of minority groups as potential nominees."<sup>16</sup> The later order instructed the Attorney General, before recommending candidates to the President, to consider whether "an affirmative effort has been made, in the case of each vacancy, to identify candidates, including women and members of minority groups."<sup>17</sup>

Although the wording of the executive orders emphasized expanding outreach efforts, the commitment being articulated may have also extended to representative outcomes from the judicial selection process. Indeed, outside of the confines of the executive orders the President and his representatives left little doubt where they stood. As early as July, 1977, Margaret McKenna, the Deputy Assistant for the White House Office of Legal Counsel, told the Federal Judicial Nominating Commission Workshop of the President's "firm commitment to affirmative action in the judicial selection process and his concern that the panels . . . find and recruit minority groups and nontraditional candidates for the federal bench."<sup>18</sup> Similarly, on August 5, 1978, Associate Attorney General Michael Egan, the key Justice Department official dealing with judicial nominations, told the American Bar Association Symposium on Merit Selection of Federal Judges that the Administration "is determined to broaden the bench and add a significant number of women and minorities."<sup>19</sup> On signing the Omnibus Judgeship Act on October 20, 1978, the President himself asserted, "This act provides a unique opportunity to begin to redress another disturbing feature of the Federal judiciary: the almost complete absence of women or members of minority groups . . . I am committed to these appointments, and pleased that this act recognizes that we need more than token representation on the Federal bench."<sup>20</sup>

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16. Exec. Order No. 12,059, 3 C.F.R. 180 (1979), *noted in* 28 U.S.C. § 44 at 6 (Supp. 1981).

17. Exec. Order No. 12,097, 3 C.F.R. 254 (1979), *reprinted in* 28 U.S.C. § 133 at 17 (Supp. 1981).

18. BERKSON & CARBON, *supra* note 8, at 34.

19. *Id.*

20. NEFF, *supra* note 15, at 190.

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Ranging quite afar from the simple outreach effort suggested by the words in the President's official executive orders, Attorney General Bell's posture before the Senate Judiciary Committee on January 25, 1979, revealed the Administration's commitment to representative outcomes from selection processes.

I perceive my role as that of being an honest broker. . . . I think I have a duty to seek out and find qualified people of all types and give the names to the senators. . . . And I think I have a duty, and this is a painful one, to say to a senator I wish you would reconsider your list. . . . We are pledged to make the judicial system more representative and I wish you would reconsider."<sup>21</sup>

At the hearing the Attorney General also made it clear that "qualified" was the bottom line requirement for the appointment of women and minorities to the bench—even if there were *more* highly qualified white male candidates under consideration as well. At bottom, Bell "believed . . . that choices of that sort had to be made to alter the composition of the bench in meaningful quantities."<sup>22</sup>

Needless to say, the asserted policy was quite controversial and fanned the debate over the implications of affirmative action for competent "merit" appointments. Making matters worse, the feared quota mentality had made its way into the White House itself. Thus, President Carter told one black reporter of his goal "to have black judges in Georgia, Florida, the Carolinas, Mississippi, Alabama, Louisiana, indeed throughout the country."<sup>23</sup> And in what was, perhaps, a more ill-considered statement the President asserted, "If I didn't have to get Senate confirmation of appointees, I could just tell you flatly that 12 percent of all my judicial appointments would be black and 3 percent would be Spanish-speaking and 40 percent would be women, and so forth."<sup>24</sup>

### *Did Affirmative Action Really Exist?: Some Perspectives*

Thus far, we have considered justifications for affirmative action in judicial recruitment as well as several criticisms aimed at such programs. An effort has also been made to define the scope and meaning of the Carter administration's affirmative action policies. It is notable, however, that all of the perspectives which we have considered, whether supportive or critical of affirmative action, have started from the premise

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21. Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502, 503 (1979).

22. NEFF, *supra* note 15, at 102.

23. As quoted in BERKSON & CARBON, *supra* note 8, at 34.

24. Hanchette, *Few Minorities Sit on Federal Bench*, Gannett News Service, 1979, appearing in Gannett News Service Special Report: *Justice on Trial*, at 5, col. 2 (may be obtained from Gannett News Service Dept. 1-800-368-3553).



that an affirmative action program *did* exist and *was* implemented in the judicial selection arena during the Carter presidency. It is important to underline that this premise is not shared by all the prospective beneficiaries of the Carter effort—judgeship candidates who were women and/or non-white. Rather, some women and minority group members argue that far from lowering the standards to be met by non-traditional nominees, the operation of the judicial selection process actually established barriers and substantially higher threshold requirements to be met by potential female and/or non-white candidates before they would be given serious consideration.

Perhaps the most controversial requirements which were imposed on nominees and often criticized because of their alleged discriminatory impact were those which mandated that except under unusual circumstances candidates would not be nominated with less than 12-15 years of legal experience or if they were over 60 years of age.<sup>25</sup> The chief objection was that non-traditional candidates have relatively less legal experience and that the nature of their experience differs substantially from what is generally considered necessary. As noted by Assistant Attorney General Barbara Babcock, a key figure in the Carter effort to search for qualified non-traditional candidates, “[W]omen lawyers do not have the same kind of resumes men do. They’ve been kept from being president of the local bar association. They don’t make partner in the firm as fast, either.”<sup>26</sup>

Elaine Jones of the NAACP Legal Defense and Educational Fund argued before the Senate Judiciary Committee that a mechanically imposed experience requirement would bar from the bench many who had a range of experience which would make them ideal candidates. Ultimately, implementing the Carter criteria “would serve to perpetuate in the judicial selection process the prior exclusion of minorities from the profession as a whole. The rule would thus serve to eliminate from our already too few numbers many who are in every respect qualified—12 to 15 years is no magic number . . . wherein, magically, one becomes experienced. One lawyer may practice . . . with shining mediocrity for years too numerous to count, while another can demonstrate superb skill

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25. The problems raised, outlined below regarding potential black nominees, are applicable to all minorities and women:

[T]he pool remains relatively small in the mid-career age range. . . . Few blacks attended law schools before or during the early 1960’s . . . [a]nd few have had opportunities to gain the kind of experience the Supplemental Instructions require: handling “complicated legal problems,” doing “legal scholarship and writing,” engaging in both trial and appellate work and working with federal law.

Fish, *Evaluating the Black Judicial Applicant*, 62 JUDICATURE 495, 497 (1979).

26. Mann, *‘New Politics’ Helps Pick Judges*, L.A. Times, Feb. 20, 1979, pt. I, at 5, col. 1.

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and ability in a mere few years.”<sup>27</sup> At the same committee hearing, David Cohen of Common Cause underlined that it was the nature of one’s legal experience and not its duration which was of importance. Further, Cohen suggested, the reputed differences in the legal experience of candidates who were *not* white males were virtues and not liabilities. “There is no . . . one type of service that prepares a person to be a good judge. The varied experience of public defenders, legal services attorneys, and civil rights lawyers would strengthen our Federal judiciary. The issues before the Federal courts span the breadth of our society. The legal experience of our judges should stretch as far.”<sup>28</sup>

A particular concern of those fearful of the discriminatory impact of the Carter guidelines for nominees was the issue of whether non-traditional candidates (particularly blacks) could withstand traditional scrutiny into their criminal records, integrity, and judicial temperament. As noted by Elaine Jones:

[U]nder the guidelines . . . conviction of a misdemeanor other than a minor traffic violation is a disqualifying factor. This . . . overlooks the fact that this country went through a civil rights revolution in the sixties and many black men and women who subsequently went to law school have misdemeanor convictions for disturbance of the peace, criminal trespass and other violations growing out of the civil rights movement which are still of record.<sup>29</sup>

The fear even existed that a record of civil rights activism would be treated as a disqualifying factor.

We do not wish a system of selection which penalizes people who have fought vigorously over the years to enforce the Constitution. . . . [E]very precaution must be taken to assure that minorities who have been on the firing line are not being excluded . . . by arguments discretely couched in terms of judicial temperament.<sup>30</sup>

While non-traditional judgeship candidates (particularly blacks) may have functioned professionally as “legal servants” meeting the daily needs of the black community or “legal militants” litigating equal protection cases against the dominant power structure,<sup>31</sup> the other side of the experiential coin suggests that they are relatively less likely to have gained prior judicial experience than their white, male counterparts. Such a reality, it was feared, would continue to work against non-traditional candidates.

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27. *Selection and Confirmation of Federal Judges: Hearing Before the Committee on the Judiciary United States Senate*, Part 1, 96th Cong., 1st Sess. 68-69 (1979) (statement of Elaine R. Jones).

28. *Id.* at 65 (statement of David Cohen).

29. *Id.* at 69 (statement of Elaine R. Jones).

30. *Id.*

31. Fish, *supra* note 25, at 497-98.

Our numbers are already small; and to heap an additional requirement such as judicial experience on those numbers virtually assures that nonparticipation of minorities in any significant way in the selection process. The impact on minorities of such a requirement . . . is exclusion.<sup>32</sup>

Indeed, it was even suggested by Susan Ness of the National Women's Political Caucus that, at least in the early days of the Carter Administration, a double standard was utilized to gauge the importance of judicial experience in potential nominees. That is, such experience appeared to be a threshold requirement for non-traditional nominees but not for white males.<sup>33</sup>

Our examination of affirmative action and judicial recruitment during the Carter Administration reveals a policy program which was the subject of much debate, controversy, and disagreement. Supporters, opponents and analysts of the Carter effort failed to agree on the impact and implications of this effort. One thing, however, does remain clear. Recruitment outcomes during the Carter Administration resulted in a more "representative" bench than had ever existed if the concept of representation is assessed by the sheer number and percentage of appointees who were *not* white males. Of Carter's 262 district and appeals court appointees 40 were women, 38 were black, and 16 were Hispanics (7 of the black and 1 of the Hispanic nominees were women). This constituted a greater number of non-traditional appointees that had been designated over the course of the nation's entire history and, clearly, was an obvious departure from the selection behavior of recent Presidents. As noted by Goldman, "By the end of the Carter Administration the proportion of women judges on the federal bench had risen from one per cent to close to seven per cent and, for blacks, from four per cent to close to nine per cent."<sup>34</sup>

Those figures, however, tell only part of the story. Clearly, the debate over affirmative action has never focused solely on the actual possibility of substantially increasing the numbers of individuals from under-represented groups in important positions in American society. Rather, controversy generally surrounded the issue of what the implications of greater representativeness were for the quality of American institutions—with the judicial branch being simply one example.

#### *Affirmative Action and the Characteristics of Judgeship Nominees*

As we have seen, many assertions and much rhetoric have character-

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32. Jones, *supra* note 27, at 69.

33. Ness, *The Bench: Where Are All the Women*, L.A. Times, Apr. 4, 1978, pt. II, at 5, col. 3.

34. Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 349 (1981).

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ized the debate over affirmative action. Little, if any, empirical research, however, has explored the consequences of recruitment outreach for the quality of the American bench. Clearly, “quality” is an elusive concept—particularly when society remains ambivalent about what constitutes a “good” judge. Nevertheless, it is possible to compare and contrast non-traditional nominees with their white male counterparts in terms of certain background characteristics, some of which are thought to be related to judicial performance. How do women, and Hispanic nominees differ from the traditional white males nominated at the same time? Can the judgement reasonably be made that non-traditional nominees were “inferior” candidates? On the other hand, is there any evidence which suggests that higher threshold qualifications were imposed before non-traditional candidates could successfully emerge from the recruitment process? The remainder of this article will focus on answering these questions by using data collected on all judicial nominees whose names were sent to the Senate Judiciary Committee for confirmation hearings during the 96th Congress. Our analysis will compare white male and non-traditional nominees on several dimensions including their demographic profiles, educational achievement, level of politicization, legal career patterns, and litigation records.<sup>35</sup> The analysis is exploratory in nature. Since advocates and opponents of affirmative action programs differ so fundamentally on what their consequences will be, no effort has been made to develop formal hypotheses about the differences between white male and all other nominees.

*Demographic Backgrounds*—Presumably, the most graphic consequences of affirmative action in judicial recruitment would be evident in the demographic and socio-economic profiles of nominees. At the most obvious level, nominations during the Carter years revealed a proliferation of what we have labelled “non-traditional” judgeship candidates—that is, nominees who were *not* white males. The larger question remains, however, of whether increased representation of minorities on the bench actually resulted in a more “representative” judiciary in substantively meaningful ways. Our data on several demographic and socio-economic variables do suggest a variety of differences between white male and non-traditional nominees which go well beyond simple considerations of race and gender.

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35. Our concept of non-traditional nominees is a broad one including all women, blacks, and Hispanics. Consequently, an effort will be made to break down the category into its component parts when such an operation significantly affects our analysis. Similarly, the analysis will generally be conducted together for district and appeals court nominees. When controlling for court level significantly alters our findings this, too, will be reported.

The strongest demographic and socio-economic differences between white male and other nominees emerged in age and income. As Table 1 shows, non-white and women nominees were significantly younger and were found disproportionately in lower income brackets than their white male counterparts.<sup>36</sup> A clear majority of non-traditional nominees (62.1%) were under the age of 50 as compared to 38.7% of the white males. Twice as great a percentage of white male nominees were over the age of 60 at the time of their nomination. In addition to and, perhaps, reflecting these age differences, non-traditional nominees tended to have substantially lower incomes. Fully 25.0% of the white males averaged more than \$100,000 per year income during the five year interval prior to their appointment, while the corresponding figure was only 8.8% for non-traditional designates. A clear majority (60.2%) of the non-traditional nominees earned less than \$60,000 per annum prior to their judgeship nomination while the corresponding figure was substantially lower (43.5%) for white males. Importantly, such income differences reflect more than simply the aggregate age (and, presumably, career stage) differences among nominees. Rather, as will be developed, they appear to reflect different career patterns and professional experiences characterizing the two classes of appointees.

Other demographic and socio-economic differences among the nominees are also of some, although less dramatic, note. For one, non-traditional nominees were considerably more likely to be born outside of the state or circuit in which their appointment was made (38.2%) than were their white male counterparts (24.3%).  $\text{Tau } B = -0.15$ , Significance = 0.02). This finding, however, was largely the result of gender based differences in birthplace ( $\text{Tau } B = 0.20$ , Significance = 0.00), with 51.7% of all female nominees born outside of the state or circuit of their appointment. The data support the view that local roots could facilitate access to the federal bench. While the argument could be made that extended search efforts were necessary to locate suitable women nominees and often resulted in candidacies of non-local lineage, such an assertion fails to explain the absence of differences in the birthplaces of whites and non-whites where a similar search is presumably needed. More to the point, we may speculate that the legal careers of the successful women nominees evidenced greater geographic mobility than that of the white

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36. For this and all future relationships discussed, unless otherwise indicated, a relationship significant at  $p \leq .05$  will be treated as statistically significant. Contingency coefficients are utilized in the few instances where variables were measured at the nominal level. For ordinally measured variables, Tau B was utilized for "square" tables with equal numbers of rows of columns. Tau C was used for "rectangular" tables with unequal numbers of rows and columns and ordinal data.

TABLE 1—Age and Income by Nominee Status

Nominee Status	Age <sup>(a)</sup>				Income <sup>(b)</sup>					
	30-39	40-49	50-59	60-69	under \$20,000	20-40,000	40-60,000	60-80,000	80-100,000	over \$100,000
Non-Traditional	12 (16.2%)	34 (45.9%)	25 (33.8%)	3 (4.1%)	2 (2.9%)	12 (17.6%)	27 (39.7%)	17 (25.0%)	4 (5.9%)	6 (8.8%)
White male	10 (7.3%)	43 (31.4%)	72 (52.6%)	12 (8.8%)	1 (0.8%)	18 (14.5%)	35 (28.2%)	26 (21.0%)	13 (10.5%)	31 (25.0%)
Total	22 (10.4%)	77 (36.5%)	97 (46.0%)	15 (7.1%)	3 (1.6%)	30 (15.6%)	62 (32.3%)	43 (22.4%)	17 (8.9%)	37 (19.3%)

(a) Tau C = 0.24, Significance = 0.00

(b) Tau C = 0.21, Significance = 0.00

males since the women's careers may have been more closely linked to the geographic mobility of their spouses. Presumably, the males could more easily pursue career opportunities closer to home and, therefore, would have access to the less difficult path to a judgeship.<sup>37</sup>

In sum, the socioeconomic and demographic data reveal that the differences between white male judicial nominees of the Carter Administration and non-traditional candidates went well beyond the obvious race and sex differences. Non-white men and women nominees added greatly to the representation on the bench of younger segments and of those with relatively lower incomes. These findings suggest numerous differences between white male and non-traditional nominees which will be explored throughout the remainder of this article. The data supports the argument made by the advocates of affirmative action that such a policy would lead to the creation of a more representative judiciary on many scores.

*Educational Backgrounds*—Since advocates and opponents of affirmative action differ markedly in their assertions about the consequences of such programs for meritorious advancement, one would expect them to have different expectations concerning how white male and non-traditional judicial nominees would fare on possible measures of their qualifications. Presumably one dimension of "quality" in judges is their educational training and attainments. Critics of affirmative action contend that those advanced through such programs received inferior educations which would result in inferior judicial performance. Advocates of affirmative action, however, assert that non-traditional candidates are the equals of white males in their professional training. Indeed, they argue that the non-traditional candidate generally required better educational credentials than white males in their professional training to cross the threshold of recruitment discrimination.<sup>38</sup> Our analysis focused on several variables to compare the educational backgrounds of white male and non-traditional candidates. These included information about the college and law school the nominees attended, where they went to law school (in or out of the state or circuit of their appointment), and whether or not they received law school honors during their professional training.<sup>39</sup>

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37. Completing our consideration of demographic and socio-economic variables, there were no significant relationships between the nominees' religious preferences and their race or gender.

38. For a broad range of views concerning the expectations critics and advocates have for the implementation and consequences of affirmative action programs see, generally, the sources cited in Goldman, *supra* note 3. See also Slotnick, *supra* note 10; Slotnick, *supra* note 21.

39. Law school honors was operationalized as attaining membership on the school's law

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In the aggregate there were no statistically significant differences between white male and non-traditional nominees in *any* of these measures of educational background and achievement. In examining the educational backgrounds of nominees, however, the argument could reasonably be made that our non-traditional nominee status is too broad in its inclusion of all non-white and female candidates and that important differences among the groups are subsumed in the categorization. In keeping with this view it could be argued that the historical pattern of disadvantagedness and institutionalized discrimination against blacks in American educational institutions would be evidenced in lower levels of educational attainment and fewer graduates of elite law schools for non-white candidates. The argument, however, might run somewhat differently for women; the successful few might disproportionately emerge from a relatively advantaged status. Thus, women, more so than non-whites, could be expected to attend the more prestigious law schools and further, might be expected to earn a relatively greater percentage of law school honors than non-white nominees.

To explore these possibilities, additional analysis was performed comparing white and non-white nominees and male and female nominees on our educational measures. The secondary analysis resulted in some findings which did not emerge from the broad comparison of white male with *all* non-traditional judgeship candidates. Thus, as Table 2 reveals, white nominees were more likely than non-whites to have earned law school honors and attended elite law schools—tending to bolster the arguments of affirmative action's critics. On the other hand, the data also supported the "threshold" theory for non-traditional appointees when applied to women candidates on the same dimension.

The data presented in Table 2 should not obscure the fact that the affirmative action concept in the context of judicial recruitment applied with equal force to non-white *and* women candidates. Historically, the federal bench has not only been disproportionately white, but disproportionately male as well. From this perspective, in the aggregate, it is

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review or law journal, earning Order of the Coif distinction, graduating at the top of one's class, competing in national moot court competition, etc. Colleges and law schools were characterized as public, private, or Ivy. Law schools were also characterized as "elite" or "less Elite." A school was considered to be "elite" if it was included on three of the following measures:

1. The Gourman Report (14 "Distinguished" law schools)
2. Barron's Guide "Group 1" law schools (14 "high resource" law schools)
3. Blau-Margulies Report (top 9 law schools)
4. Cartter Report (top 15 law schools)
5. Ladd-Lipset Report (top 8 law schools)
6. Juris Doctor (top 13 law schools).



TABLE 2—Status of Law School Attended and Attainment of Law School Honors by Race and Gender.

		Status of Law School		Attainment of Law School Honors	
		ELITE	LESS ELITE	YES	NO
Race	White	(a) 73 (44.8%)	90 (55.2%)	(b) 62 (38.0%)	101 (62.0%)
	Non-White	14 (29.2%)	34 (70.8%)	7 (14.6%)	41 (85.4%)
Gender	Male	(c) 71 (39.9%)	107 (60.1%)	(d) 53 (29.8%)	125 (70.2%)
	Female	16 (48.5%)	17 (51.5%)	16 (48.5%)	17 (51.5%)

(a) Tau B = 0.13, Significance = 0.03

(b) Tau B = 0.21, Significance = 0.00

(c) Tau B = -0.06, Significance = 0.18

(d) Tau B = -0.14, Significance = 0.02

clear that affirmative action in judicial selection during the Carter administration did *not* dilute the quality of the federal judiciary (or, for that matter, raise it higher) when the educational backgrounds of non-traditional nominees are juxtaposed with those of white males. We do not mean to suggest that the “quality” of a judge is wholly reflected in his or her educational background. However, educational background and achievement are frequently issues in debates over the consequences of affirmative action for the quality of the federal bench.

*Politicization*—A third set of variables that we examined focused on several available measures of a nominee’s politicization or political activity in an effort to assess whether white males differed from all other judgeship candidates on these indicators.<sup>40</sup> While our measures of political

40. While virtually all (93.1%) of the nominees during the 96th Congress were Democrats, it should be noted that non-traditional candidates were more likely to be Independents and less likely to be Republicans than white male nominees. (Contingency coefficient = 0.23, Significance = 0.00). Indeed, 9 out of the 10 Republicans nominated were white males and there were no black Republican nominees. While Republicanism was a clear liability for *all* potential candidates, it appeared to be a virtually fatal and insurmountable barrier to the non-traditional candidate. It should be noted, however, that candidate pools for non-tradi-

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involvement are somewhat imperfect, they should collectively create a portrait of the level of political activity of Carter nominees. The variables utilized included measures of whether the nominees had made any speeches during the past five years that they characterized as "significant," whether they had ever held (through appointment or election) a public office, whether they had ever played a significant role in a political campaign, and whether they had ever been a candidate for a non-judicial elective office. As Table 3 demonstrates, there is little difference between white male nominees and non-traditional candidates on the relatively diffuse measures of self-ascribed significant speeches (of unspecified, open content), and the holding of public office (honorific or otherwise). When we move to more blatantly political activity involving campaign work and political candidacies the differences between the white male and non-traditional candidates emerge more strongly.

These patterns are not surprising. Both conventional wisdom and academic research have demonstrated the tendency for federal judges to emerge from among attorneys who "knew" a senator—sometimes as a campaign worker and sometimes as a fellow candidate.<sup>41</sup> Political activism, however, has less often been associated with racial minorities and women. Consequently, it has not been as frequently associated with their elevation to the bench. Nevertheless, it should be noted that the differences between white males and non-traditional nominees on politicization measures are largely the result of gender associated differences. As Table 4 illustrates, women and men differed significantly on *each* of our four politicization measures. Whites and non-whites differed significantly on none.

Curiously, the gender differences were not all in the expected direction. Thus, women were *more* likely to perceive themselves as having made significant speeches than men. Therefore, this variable may not be tied solely or predominantly to political activity *per se* but may include a broad range of speechmaking in other areas such as charitable, social, or cultural concerns. On the other politicization measures however, the gender based differences strikingly demonstrated relatively lower levels of political activity and involvement by women appointees than men.

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tional candidates are clearly more limited than those for white males. Under such circumstances qualified Republicans, particularly among non-whites, might prove virtually impossible to find.

41. For a description of the role of patronage in federal bench appointments, see H. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1972); for a more recent view of senatorial prerogatives in judicial selection, see Slotnick, *supra* note 10.

TABLE 3—Politicization by Nominee Status

Politicization Measures								
Nominee Status	Significant Speeches <sup>(a)</sup>		Public Office Holder <sup>(b)</sup>		Significant Campaign Role in Campaign Other Than One's Own <sup>(c)</sup>		Candidate for Non-Judicial Elective Office <sup>(d)</sup>	
	None	1-10	More than 10	NO	YES	NO	YES	
	26 (35.6%)	38 (52.1%)	9 (12.3%)	16 (21.6%)	58 (78.4%)	52 (70.3%)	22 (29.7%)	
	Non-Traditional						51 (68.9%)	23 (31.1%)
	White Male						78 (56.9%)	59 (43.1%)
Total						129 (61.1%)	82 (38.9%)	

(a) Tau C = -0.04, Significance = 0.29

(b) Tau B = 0.06, Significance = 0.13

(c) Tau B = 0.17, Significance = 0.01

(d) Tau B = 0.12, Significance = 0.04

TABLE 4—Politicization by Nominee Gender

		Politicization Measures								
		Significant Speeches <sup>(a)</sup>		Public Office Holder <sup>(b)</sup>		Significant Campaign Role in Campaign Other Than One's Own <sup>(c)</sup>		Candidate for Non-Judicial Elective Office <sup>(d)</sup>		
Nominee Gender		None	1-10	More than 10	NO	YES	NO	YES	NO	YES
	Male	71 (40.3%)	89 (50.6%)	16 (9.1%)	25 (14.0%)	153 (86.0%)	99 (55.9%)	78 (44.1%)	100 (56.2%)	78 (43.8%)
	Female	7 (21.9%)	19 (59.4%)	6 (18.8%)	12 (36.4%)	21 (63.6%)	25 (75.8%)	8 (24.2%)	29 (87.9%)	4 (12.1%)
	Total	78 (37.5%)	108 (51.9%)	22 (10.6%)	37 (17.5%)	174 (82.5%)	124 (59.0%)	86 (41.0%)	129 (61.1%)	82 (38.9%)

(a) Tau C = 0.12, Significance = 0.01

(b) Tau B = -0.21, Significance = 0.00

(c) Tau B = -0.15, Significance = 0.02

(d) Tau B = -0.24, Significance = 0.00

While the Carter Administration's affirmative action program in judicial recruitment did not depoliticize the federal bench, it did result in the appointment of greater numbers of judges lacking active political backgrounds. Analysts have long disagreed about the virtues of having politically active individuals serving in judicial positions but, thankfully, that is a debate which need not be entered into here. From the perspective of assessing the consequences of affirmative action in judicial recruitment it suffices to note that the pattern of lower politicization characterizing non-traditional nominees emerges as yet another component of the increased representativeness such appointees have brought to the federal bench.

*Legal Careers*—The most compelling questions surrounding affirmative action and recruitment to the federal bench, as seen, concern the implications of such programs for the qualifications and likely performance of those chosen to serve. Indeed, the pluralist premises behind affirmative action envision an enrichment of perspectives in judicial decision-making as a consequence of increased representation. On the other hand, critics of affirmative action counter that such an "enrichment" is merely a euphemism for the lowering of standards and qualifications for those gaining entree to judgeships.<sup>42</sup>

As we have seen, defining "quality" in a judicial nominee is an elusive endeavor. Nevertheless, it has proven instructive to juxtapose white male and non-traditional nominees on dimensions including their demographic, educational, and politicization profiles. Most central to our empirical analysis, however, remains the question of how affirmative action has altered, if at all, possible paths to federal judgeships. In the final analysis, has affirmative action made a significant difference in the types of attorneys raised to the bench when attention is focused on the professional qualifications and legal careers of the newly appointed?

Numerous indicators were used to examine the legal careers from which judgeship nominees emerged. Among them were the following:

1. Prior Judicial Experience
2. Prior Prosecutorial Experience
3. Legal Aid or Public Defender Experience
4. Clerking Experience with State Supreme Court Justice, U.S. District Judge, U.S. Supreme Court Justice
5. Last Job Prior to Nomination
6. Highest Court Before which Nominee has been Admitted to Practice (State Court, U.S. District Court, U.S. Court of Appeals, U.S. Supreme Court)

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42. See *supra* note 38.

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7. Years at Bar
8. Professional Publication Record
9. ABA Rating
10. Litigation Experience.<sup>43</sup>

Each candidate was also required to provide detailed case studies of the ten most significant legal matters that they had personally handled during their careers. Operating on the assumption that those case studies offered important evidence of how nominees perceived their own careers, each case was coded on a number of variables for each nominee. Summary variables were also created for each nominee based on aggregating the data obtained from the ten case studies. Included were measures of the percentage of the case studies arising in the federal judiciary, involving civil law, and reaching appellate courts. Finally, each case study was also coded according to its subject matter and an attempt was made to operationalize the concept of a "non-traditional" legal practice based on the summary aggregation of the case studies for each nominee.<sup>44</sup>

Table 5 reveals that our two classes of nominees differed significantly on some measures of professional experience prior to being nominated to the federal bench, while they were indistinguishable from each other on several others. Thus, the likelihood of having served as a prosecutor or a law clerk did not appear to differ for white male and other candidates. Dramatic differences emerged, however, when the prior judicial experience and public defender/legal aid backgrounds of candidates were considered, with non-traditional candidates more likely to enjoy both such credentials in their backgrounds. Indeed, less than half of the white male nominees as compared to approximately two thirds of the non-traditional candidates had served as judges before their federal appointment. Equally noteworthy, more than twice as many non-traditional

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43. Several items in the Senate Judiciary Committee Candidate questionnaires attempted to measure a nominee's litigating experience. These included estimates of the frequency of court appearances, the percentage of a candidate's litigation which occurred in federal, state, or other courts, and the percentage of a candidate's litigation which involved civil matters versus criminal concerns.

44. The subject matter codes used to categorize the case studies were as follows: Business Organization and Management, Contracts, Real Property, Torts, Personal Finances, Family and Estate, Criminal, and several Public Law categories (Governmental Regulatory Powers, Prisoner and Defendant Rights, Equal Protection and Abuse of Governmental Authority). Areas of legal practice categorized as non-traditional in this study were criminal defense, public law plaintiff (or defendant against governmental regulatory activity), tort plaintiff, personal finances, and family law. Such practices are, according to conventional wisdom, less likely to lead to federal judgeships. Nominees who acted in these capacities in at least four of the ten case studies developed in the questionnaire were considered to have a non-traditional practice.

TABLE 5—Legal Career Patterns by Nominee Status

Nominee Status	Career Measures							
	Prior Judicial Experience <sup>(a)</sup>		Prior Prosecutorial Experience <sup>(b)</sup>		Public Defender, Legal Aid Experience <sup>(c)</sup>		Law Clerk Experience <sup>(d)</sup>	
	NO	YES	NO	YES	NO	YES	NO	YES
Non-Traditional	25 (33.8%)	49 (66.2%)	44 (59.5%)	30 (40.5%)	38 (51.4%)	36 (48.6%)	62 (83.8%)	12 (16.2%)
	70 (51.1%)	67 (48.9%)	73 (53.3%)	64 (46.7%)	103 (76.3%)	32 (23.7%)	105 (76.6%)	32 (23.4%)
White Male	95 (45.0%)	116 (55.0%)	117 (55.5%)	94 (44.5%)	141 (67.5%)	68 (32.5%)	167 (79.1%)	44 (20.9%)
Total								

(a) Tau B = -0.17, Significance = 0.01

(b) Tau B = 0.06, Significance = 0.20

(c) Tau B = 0.25, Significance = 0.00

(d) Tau B = 0.08, Significance = 0.11

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nominees (48.6%) had served in a public defender-legal aid capacity than had the white males (23.7%). Further, consideration of the last job held by nominees prior to their appointment demonstrated that non-traditional nominees were predominately drawn from the ranks of sitting judges (59.5%). The corresponding figure for white males was only 39.4%. In a similar vein, nearly half (49.6%) of the white males chosen ascended to the bench from private practice with the corresponding figure for non-traditional nominees a substantially less robust 25.7%. When it is added that nearly twice as many non-traditional nominees (9.5%) held law school professorships immediately prior to their appointment than white males (5.1%) affirmative action can be seen to have led to greater diversification of career experiences on the federal bench. Given the nature of these aggregate career experiences one would be hard pressed to assert that non-traditional candidates have diluted the quality of the federal bench. Indeed, it is data such as these which have led spokespersons for the expansion of the representativeness of the federal bench to conclude that non-traditional candidates need to surpass a threshold for appointment consideration placed at a higher plane than that used to gauge white male candidacies.<sup>45</sup>

Additional insights are gained when it is noted that some of the differences found in professional background are most associated with the patterns revealed by an identifiable segment of the broad non-traditional nominee category. For example, the tendency for non-traditional nominees to have had judicial and public defender/legal aid experience was more highly associated with racial as opposed to gender differences among nominees. On the other hand, while white male and all other nominees demonstrated no differences regarding their prosecutorial or law clerking experiences, women were approximately half as likely to have served as prosecutors than men (Tau B = 0.18, Significance = 0.00), and non-whites were only about one third as likely to have gained clerking experience as white nominees (Tau B = -0.17, Significance = 0.01).

Other professionally oriented measures revealed additional differences between white male and non-traditional nominees. For one, the white males evidenced considerably more years of legal experience than other nominees as portrayed in Table 6. Indeed, only 19% of the white male nominees had under 20 years of legal experience while nearly half (46%) of the non-traditional nominees fell into this category. On the other side of the experiential coin 57.6% of the white males had more than 25 years to their credit in the legal profession while the figure dropped dramati-

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45. See, e.g., Jones, *supra* note 27; Cohen, *supra* note 28; Ness, *supra* note 33.



cally to 27% for non-traditional nominees. Similarly, white male candidates tend to have been admitted to practice before a "higher" level court than non-whites and women (Tau C = -0.14, Significance = 0.02). Thus, 57.8% of the white male nominees have been admitted to practice before the U.S. Supreme Court, and 81.5% have been admitted to the federal bar at least as high as the circuit court level. The corresponding figures for non-traditional candidates are 45.9% and 68.9% respectively.

TABLE 6—Legal Experience by Nominee Status<sup>(a)</sup>

Nominee Status		Years at Bar					
		6-10	11-15	16-20	21-25	26-30	31 +
		2 (2.7%)	15 (20.3%)	17 (23.0%)	20 (27.0%)	12 (16.2%)	8 (10.8%)
Nominee Status	Non-Traditional	2 (2.7%)	15 (20.3%)	17 (23.0%)	20 (27.0%)	12 (16.2%)	8 (10.8%)
	White Male	0 (0.0%)	9 (6.6%)	17 (12.4%)	32 (23.4%)	38 (27.7%)	41 (29.9%)
	Total	2 (0.9%)	24 (11.4%)	34 (16.1%)	52 (24.6%)	50 (23.7%)	49 (23.2%)

(a) Tau C = 0.36, Significance = 0.00

It should be noted, however, that admission to practice before prestigious courts, such as the U.S. Supreme Court, is often largely honorific—requiring only a sponsor and the payment of a fee. Perhaps the data does reflect however, the tendency of the non-traditional nominees not to share equally in the accoutrements of status as defined by the established bar. On yet another possible measure of professional prominence and prestige, however, candidates' publication records, there are *no* aggregate differences between white male and all other appointees.

Examining the litigation experience of the Carter nominees also reveals a mixed pattern of similarities and differences between white males and all other designates. No significant differences appeared between white male and non-traditional nominees in the frequency of their court appearances; the relative percentages of their federal and state litigation; and their propensity to choose appellate versus trial and civil versus criminal cases as the most important legal matters personally handled. It does appear, however, that non-traditional nominees, particularly non-whites, were more heavily involved, in the aggregate, in criminal litigation than their white male counterparts (Tau C = -0.14,

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Significance = 0.02). Similarly, there was a greater likelihood for the non-traditional candidates to be classified as being engaged in a non-traditional legal practice on the basis of coding the subject matter of the ten volunteered case studies (Tau B = -0.14, Significance = 0.03). Thus, a solid majority (55.7%) of the non-traditional nominees (57.9% of the non-whites) were classified in this fashion as compared to 40.2% of the white males (and 41.5% of all whites). The greater likelihood for non-traditional candidates to engage in non-traditional legal practices offers additional evidence of the greater diversity and representativeness brought to the federal bench by the workings of affirmative action in the judicial recruitment process.

The most dramatic differences between white male and other nominees on a measure putatively related to professional concerns emerged on the American Bar Association's ratings of judgeship candidates. It must be noted, however, that this relationship remains somewhat puzzling, troubling, and largely inexplicable in the context of the data examined throughout this article. Table 7 reveals that under one quarter (24.7%) of the non-traditional candidates received the two highest ABA designations while a substantial majority of white males (68.4%) enjoyed this distinction. Nearly four times as many white males (9.6%) were designated "exceptionally well qualified" when juxtaposed with non-whites and females (2.6%). The data are suggestive of a number of possibilities. For one, it is possible that the ABA ratings reflect a bias in favor of some of the measures of professional prestige which we have been viewing (that is, years experience, income, etc.). Conversely, the ABA focus may work to disadvantage those who have pursued less traditional paths in their legal careers in terms of the clients they represent and the types of cases in which they are involved. Another possibility is simply that the multiple measures utilized here may not tap the same elements that lead to the ABA rankings. Nevertheless, in view of the realities of the data viewed there is little evidence, in the aggregate, that non-traditional nominees have been less qualified to serve on the federal bench than their white male counterparts. Certainly, given the extreme differences in ABA ratings received by white male and non-traditional candidates (which appear equally strong when all whites are compared to non-whites, and all men to all women), the continued charges of conservatism (and sometimes racism and sexism) levelled at the ABA's Standing Committee on Federal Judiciary, and the importance of the Committee in the judicial recruitment process, wise counsel suggests the

need for further analysis of the Committee, its operation, and the correlates of its candidate evaluations.<sup>46</sup>

TABLE 7—ABA Rating by Nominee Status<sup>(a)</sup>

		ABA Rating			
		Exceptionally Well Qualified	Well Qualified	Qualified	Not Qualified
Nominee Status	Non-Traditional	2 (2.6%)	17 (22.1%)	56 (72.7%)	2 (2.6%)
	White Male	13 (9.6%)	80 (58.8%)	42 (30.9%)	1 (0.7%)
	Total	15 (7.0%)	97 (45.5%)	98 (46.0%)	3 (1.4%)

(a) Tau C = -0.41, Significance = 0.00

### *Some Concluding Thoughts*

Much debate has occurred in American society focusing on the legitimacy, wisdom, and consequences of affirmative action programs. Particular emphasis has been placed on the issue of whether added attentiveness to the demands of one group, by definition, constitutes invidious discrimination against another as well as on the relationship between affirmative action and merit. Our focus has been on the latter of these concerns.

For the most part, public dialogue on affirmative action has taken place at a highly rhetorical and polemical level with little attempt to generate or utilize empirical evidence. Within the context of judicial selections during the tenure of the 96th Congress, this article has attempted to set out a data base which might be useful in evaluating one specific affirmative action program while also serving to help inform ongoing debates on affirmative action.

Our research has revealed that non-traditional judgeship candidates, who emerged in large numbers as a consequence of the Carter Administration's affirmative action efforts, differed greatly from the traditionally recruited white males in ways that went well beyond the obvious social and gender lines. Clearly, affirmative action did *not* lead to the appoint-

46. For an extensive consideration of the operation of the ABA Committee and an empirical analysis of its candidate ratings and their correlates, see Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment* (pts. 1 & 2), 66 JUDICATURE 348 (1983), 66 JUDICATURE 385 (1983).

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ment of non-whites and females who were the mirror images of the white males they would sit beside on the bench. Rather, along with great diversity within their ranks, enhanced gender and racial representation on the bench added substantially to pluralism in the federal judiciary with increased representation of, among others, the young, the relatively less affluent, the less politically active, the attorney with non-traditional and, especially, criminal law practices, and the attorney with public defender/legal aid backgrounds.

It is not an easy task to measure "quality" among judicial nominees and, indeed, it is highly unlikely that a consensus could ever be fashioned around the question of what goes into the making of a "good" judge. We have however, examined white male and all other Carter nominees on a host of variables, some of which are bound to be an integral part of *any* analyst's measure of quality and *all* of which would undoubtedly find their way into some analyst's metric. On some such measures, white male nominees appeared to come out "ahead" of their non-traditional counterparts. Often, these variables were related to general societal norms attached to professional prestige, stature, and success. Thus, white male nominees were significantly older, wealthier, more experienced, more likely to practice before higher level courts, and more likely to have gained a higher ABA rating than non-traditional designates. On most of our measures, however, non-traditional nominees appeared equally qualified or, indeed, fared somewhat "better" than the white males. Most prominent among these, perhaps, was the greater propensity for the non-traditional candidate to have gained judicial experience prior to his or her current federal appointment.

Sheldon Goldman has argued that, "in my view the credentials of the black, women, and Hispanic Carter appointees and nominees have been impressive. . . . Indeed, it is my distinct impression based on over 16 years of research on the backgrounds of federal judges that the credentials of the women and minorities chosen by the Carter Administration on the whole may even be more distinguished than the over-all credentials of the white males chosen by Carter and previous administrations."<sup>47</sup> While it is not our intention to argue, in any sense, that the non-traditional nominees of the Carter administration are objectively "better" than their white male counterparts, given the data we have presented it is certainly difficult, if not impossible, to convincingly argue that the quality of the federal bench has been diluted by affirmative action. Indeed, on measures ranging from educational training to several aspects of legal backgrounds, litigating behavior, and publication

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47. Goldman, *supra* note 3, at 492-93.

records of the nominees it is impossible to draw meaningful distinctions between white male and non-traditional nominees that could lead to assessments of differential quality. Furthermore, there is some evidence which supports the threshold theory discussed throughout the paper. That is, perhaps some criteria for the advancement of non-whites and women are placed at a relatively *higher* level of attainment before such individuals are given serious consideration. This appears to be the case when the questions of prior judicial experience and the most recent employment of judgeship nominees were considered. Indeed, the data viewed including, in particular, the ABA ratings of judicial nominees suggest that the primary issue implicated by the judicial selection process during the Carter years was not, necessarily, merit *versus* affirmative action. Rather, it appears, the central issue may have been the question of whose definition of merit would prevail? That is, would selection outcomes reflect the traditional standards of the established legal (and governmental) community or, alternatively, would new interests active in the selection process be successful in imposing their standards of merit to a greater extent than ever before on recruitment outcomes?